2000

Petition for a Writ of Certiorari, Chris v. Tenet, No. 00-829 (U.S. Nov 16, 2000)

David C. Vladeck
Georgetown University Law Center

Docket No. 00-829

NO. ___

IN THE

Supreme Court of the United States

KELLY JEAN CHRIS,

Petitioner,

v.

GEORGE J. TENET, DIRECTOR,
CENTRAL INTELLIGENCE AGENCY,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 2000

QUESTION PRESENTED

Whether the Fourth Circuit erred in holding, contrary to this Court's ruling in *New York Gaslight Co. v. Carey*, 447 U.S. 54 (1980), and the holdings of the Eighth and Tenth Circuits, that district courts lack subject matter jurisdiction over Title VII cases brought solely to obtain attorney's fees and costs by plaintiffs who have prevailed in administrative proceedings?

PARTIES TO THIS PROCEEDING

The parties to this proceeding are set forth in the caption. Kelly Jean Chris is a pseudonym assigned to Petitioner by Respondent Central Intelligence Agency for the purposes of this litigation. Petitioner's real name cannot be used because she has a covert assignment.

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PETITION FOR A WRIT OF CERTIORARI

Kelly Jean Chris respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 221 F.3d 648 (2000) and is set forth in the Appendix ("App._") at A1-A16. The opinion of the district court is reported at 57 F. Supp. 2d 330 (E.D. Va. 1999) and is reproduced in the Appendix at A17-A38. The district court's orders are not reported and are reproduced in the Appendix at A39-A41.

JURISDICTION

The judgment of the Fourth Circuit was entered on July 27, 2000. By order entered on October 10, 2000, the Chief Justice extended petitioner's time to file a petition for a writ of certiorari to and including November 24, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17, provides, in pertinent part:

> Each United States district court . . . shall have jurisdiction of actions brought under this subchapter. 42 U.S.C. § 2000e-5(f)(3).

Section 706(k) of the Act provides:

> In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." *Id.* § 2000e-5(k).

Section 717(c) of the Act provides, in pertinent part:

> Within 90 days of the receipt of notice of final action taken by a department, agency, or unit . . . or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency or unit . . ., an employee . . . if aggrieved by the final disposition of his complaint . . . may file a civil action as provided in section 2000e-5 of this title . . .. *Id.* § 2000e-16(c).

STATEMENT OF THE CASE

1. Petitioner Kelly Jean Chris has been employed as a secretary by Respondent Central Intelligence Agency ("CIA" or "agency") since 1987. Beginning in 1993, Chris filed a number of complaints against the agency alleging sex discrimination. These complaints were an outgrowth of the agency's decision to deny Chris an overseas assignment. The agency's Overseas Candidate Review Board concluded that Chris was "too

attractive" for the location, that she was too "head strong and strong willed," and hence temperamentally unsuited for the appointment, and that the agency had previously experienced a problem with a female employee at that post. At the time Chris was denied the appointment, the agency placed in her personnel file a letter criticizing Chris for maintaining an unapproved relationship with a foreign national at a previous overseas post, even though male employees who had had similar relationships had not been sanctioned.

Title VII erects significant exhaustion requirements as prerequisites to filing suit. As a federal employee claiming sex discrimination in violation of Title VII, Chris was obligated first to submit her dispute to informal conciliation and then to file a formal complaint with the CIA, participate in the agency's investigation, and await its decision. 42 U.S.C. § 2000e-16(c); 29 C.F.R. §§ 1614.105, 1614.106(a); 1614.108 (2000); *see generally West v. Gibson,* 119 S. Ct. 1906, 1910 (1999). These steps are preconditions either to submitting an appeal of the agency's decision to the Equal Employment Opportunity Commission ("EEOC" or "Commission") or to filing suit in district court. 42 U.S.C. § 2000e-16(c). If an employee decides to pursue her claim before the EEOC, she retains the right to file suit in district court if she is "aggrieved" by the EEOC's final decision, or if she is dissatisfied with the pace of the EEOC's proceeding. *Id.*

These administrative steps are daunting to federal employees because agency and EEOC proceedings are formal, adversarial, hard-fought, and time-intensive, often taking years to resolve. Chris determined that she needed counsel to help her navigate this process. Like most employees in Chris' position, she could not afford to pay a lawyer on a fee-for-service basis. Chris was able to retain counsel based in Washington, D.C.

(where the EEOC has its offices) on a contingency fee basis, but had to pay for the costs of the litigation, including the cost of hiring a private investigator to track down the former CIA agent who made the comment that Chris's appointment to an overseas post had been denied because she was too attractive.

2. Chris filed her initial administrative complaint with the CIA in September 1993. In March 1994, the agency's Equal Employment Opportunity ("EEO") office issued a report finding no discrimination. Chris appealed to the EEOC. Meanwhile, the CIA's Inspector General launched a criminal investigation into the circumstances surrounding Chris's prior unapproved relationship with a foreign national. Because Chris believed that the investigation was commenced in retaliation for her initial discrimination complaint, she filed a second administrative complaint with the agency in July 1994. The agency's EEO office rejected Chris's retaliation charge in March 1995. Chris then appealed that decision to the EEOC.

While her appeals were pending, Chris continued to gather evidence to support her discrimination claim. Chris's private investigator located the retired CIA agent who allegedly had said that Chris had been rejected because she was too attractive, but the agent denied making that statement. However, during the deposition of the CIA's EEO counselor — the agency official charged with investigating Chris's claims — the counselor admitted that the agent had, in fact, made the disputed statement. Following the deposition, the agency agreed to settle both of Chris's complaints on terms favorable to Chris, but the question of fees and costs was reserved for further proceedings. The CIA conceded that Chris was a "prevailing party" within the meaning of Title VII and that it therefore was liable for Chris's attorney's fees for work before both the agency and the EEOC. The parties, however, could

not reach an agreement on the amount of costs and fees to be paid. Chris's attorney submitted to the agency a fee petition based on the then-current "*Laffey*" rates, a detailed account of her hours, an affidavit attesting to her experience and billing practices, and an itemized list of the costs incurred.[1] The total amount of costs and fees requested was approximately $80,000. The CIA, in contrast, offered approximately $50,000, based on a below market rate for plaintiff's counsel.

Chris appealed to the EEOC, which awarded approximately $60,000. Most of the $20,000 differential between Chris's request and the EEOC's award was attributable to the EEOC's refusal to use counsel's full *Laffey* rate in calculating her fee, although the Commission also disallowed some of counsel's hours and refused to award the full cost of hiring an investigator. Both Chris and the CIA sought reconsideration. In an amended order, the EEOC reaffirmed its decision to award counsel below market rates and reduced the fee award by another $3,000. The order also informed Chris of her right to petition the EEOC for enforcement should the CIA fail to make payment, and her right to "file a civil action on the

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[1] The "*Laffey*" rates are based on prevailing market rates for attorneys in the District of Columbia, given their years of experience. The approach was set out initially in *Laffey v. Northwest Airlines*, 746 F.2d 4, 24-25 (D.C. Cir. 1984) and has been carried forward by the Civil Division of the U.S. Attorney's Office for the District of Columbia. Each year that office adjusts the rates to account for inflation, and generally those rates are used to determine attorney's fee awards in the District of Columbia. *See, e.g., Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995); *Blackman v. District of Columbia*, 59 F. Supp. 2d 37, 43 (D.D.C. 1999).

underlying complaint . . . It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision." (Capitalization and underlining in original).

3. Chris filed suit in the United States District Court for the District of Columbia against the CIA seeking an award of reasonable attorney's fees and costs in connection with her EEO complaints. Jurisdiction was alleged under 28 U.S.C. § 1331, 28 U.S.C. § 1343, 42 U.S.C. § 2000e-5(f)(3), and 42 U.S.C. § 2000e-16(c) and (d). On the CIA's motion, the case was transferred to the United States District Court for the Eastern District of Virginia, and the CIA then filed a motion to dismiss under Rule 12(b)(1), Fed. R. Civ. P., arguing that the court lacked subject matter jurisdiction over Chris' complaint. The district court granted the agency's motion, 57 F. Supp. 2d 330 (App. A17), concluding that Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), covered only cases seeking to enforce what the court described as the "substantive rights guaranteed" by the Act but did not extend to cases seeking attorney's fees alone.[2]

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[2]During the settlement negotiations involving her first two EEO complaints, Chris learned that she was still being shortchanged in assignments. She therefore filed a third complaint with the agency in February 1995. That claim was settled in September 1996, again with the understanding that the attorney's fee issue would be litigated. The CIA did not dispute the number of hours Chris's counsel expended on the third complaint, but it again refused to base a fee award on *Laffey* market rates. Chris appealed the ruling to the EEOC,

(continued...)

The Fourth Circuit affirmed, ruling that federal district courts lack subject matter jurisdiction over actions filed under Title VII that seek only attorney's fees and costs. 221 F.3d 648 (2000). The court reasoned that the jurisdictional grant set forth in 42 U.S.C. § 2000e-5(f)(3) — which speaks of "actions brought under this subchapter" — refers only to complaints "to remedy an unlawful employment practice, rather than [complaints that] contain only a single claim for attorney's fees and costs." *Id.* at 652 (App. A9). In so ruling, the court recognized that *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), held that district courts have jurisdiction to entertain Title VII complaints by plaintiffs who have prevailed in administrative proceedings and are seeking attorney's fees and costs only. Nonetheless, the court found *Carey* inapposite, both because the plaintiff in *Carey* initially sought merits relief in federal court in addition to her claim for attorney's fees, 221 F.3d at 654 (App. A12), and because this Court's intervening decision in *North Carolina Dep't of Transp. v. Crest St. Community Council, Inc.*, 479 U.S. 6 (1986), found that the "policy concerns noted in the *Carey* decision . . . [were] 'dicta' and 'exaggerated.'" *Id.*

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[2](...continued)
which, in July 1999, awarded Chris's counsel about $2,000 in fees, also based on below market rates. Shortly after the district court dismissed her first action, Chris filed a second complaint seeking fees for the legal work conducted in resolving her third administrative complaint. By amended order dated September 15, 1999 (App. A40), the district court dismissed this action for the reasons given in its prior opinion. On appeal, the Fourth Circuit consolidated Chris's separate appeals from the district court's orders and affirmed.

The Fourth Circuit acknowledged that its ruling was in conflict with *Jones v. American State Bank,* 857 F.2d 494, 498 (8th Cir. 1988), which post-dated *Crest Street* by two years. *Jones* held that *Carey* dictated the conclusion that Title VII confers jurisdiction on district courts to entertain claims for attorney's fees where the plaintiff had prevailed in an administrative proceeding. But the Fourth Circuit "declined to follow the Eighth Circuit's holding in *Jones*" because its reasoning was "unpersuasive" and because the Eighth Circuit erred by looking to *Carey* instead of *Crest Street* for guidance. 221 F.3d at 655 (App. A15).

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted in this case for three related reasons. First, the decision below upsets the understanding that has existed at least since *New York Gaslight Club v. Carey,* 447 U.S. 54 (1980), that Title VII's jurisdictional provision authorizes suits for fees and costs where the plaintiff has prevailed in administrative proceedings. As this Court emphasized in *Carey,* because "it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that . . . [Title VII's] authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees." 447 U.S. at 66. Not only does the Fourth Circuit's decision disregard *Carey*'s holding, it also breaks ranks with the rulings of other circuits. Relying on *Carey,* lower federal courts have, until now, consistently held that district courts have jurisdiction over Title VII fee-only cases. Moreover, in cases arising under the Individuals with Disabilities Education Act ("IDEA"), which contains a fee provision modeled on Title VII's, the courts have also unanimously followed *Carey* and not *Crest Street* in holding

that federal courts have jurisdiction over cases brought solely to obtain fees. Accordingly, review is warranted because the Fourth Circuit's decision is contrary to *Carey*, in conflict with the decisions of other circuits, and irreconcilable with the case law interpreting virtually identical language in the IDEA.

Second, the ruling below merits review because it encourages Title VII complainants to by-pass administrative remedies and proceed to court, contrary to Congress' goal in the Act. The ruling does so by denigrating the pivotal role the attorney's fee provision in Title VII plays in the enforcement of the Civil Rights Act. The crux of the Fourth Circuit's holding — that Title VII's attorney's fee provision is not part and parcel of the substantive guarantees of the Act — cannot be reconciled with this Court's ruling in *Carey*, with this Court's decisions applying Title VII, with the structure and design of Title VII, or with the historic understanding of the role fee-shifting provisions play in the enforcement of important federal policies. It is crucial to understand that the Fourth Circuit's ruling that district courts may not entertain fee-only cases has no logical stopping point: The court's rationale applies to *all* Title VII litigants, not just federal employees, and it would apply with equal force if Petitioner's counsel had been denied a fee altogether. The only way a Title VII litigant could avoid the risk of the Fourth Circuit's ruling would be to abandon the administrative process as soon as possible and head to court. The remedial purposes of Title VII would be ill-served by such a cramped and illogical construction of its jurisdictional provision, and the Fourth Circuit's new limitation on Title VII's jurisdictional reach warrants review by this Court.

Third, the Fourth Circuit's holding will especially frustrate Congress' effort to encourage federal employees to pursue their Title VII claims before the EEOC rather than in

federal court. This concern cannot be overstated. Every year, federal employees file over 25,000 discrimination claims with their agencies, and over 8,000 of these claims end up before the EEOC. EEOC, *Federal Sector Report on EEO Complaints Processing and Appeals Fiscal Year 1998* (Office of Federal Operations, Federal Sector Programs), at 19, 61 (1999) (hereinafter "*EEOC Federal Sector Report*"). The ruling below gives federal employees a Hobson's choice — they may either forfeit their right to seek EEOC review and go to court, or remain before the EEOC and risk under-compensation — a choice that will lead many to forego EEOC review. The resulting shift of cases away from the EEOC and into federal court may be as dramatic as it is unfortunate, and is plainly at odds with congressional intent.

A. The Fourth Circuit's Ruling Conflicts With *Carey* And Decisions From Other Circuits.

This Court should grant review because the decision below is contrary to this Court's holding in *Carey* and is in direct conflict with the rulings of the Eighth and Tenth Circuits. The analytical starting point must be *Carey*, which is the Court's only opinion addressing whether Title VII confers jurisdiction in fee-only cases. There, the plaintiff filed a complaint with the EEOC alleging that the New York Gaslight Club had denied her employment because of her race. 447 U.S. at 57. As Title VII requires, the EEOC referred Carey's complaint to the New York Division on Human Rights, which found that the Club had discriminated against Carey and that she was entitled to back pay and employment; attorney's fees were not awarded because the state agency was not empowered to make such an award. *Id.* at 58. While the Club pursued an appeal in state court, the EEOC began its proceeding. Based mainly on the state's finding, it too found probable cause and issued Carey a right to

sue letter. *Id.* Carey then filed suit in federal court under Title VII, seeking damages, injunctive relief, and attorney's fees. *Id.* Before the parties moved ahead in the federal court action, the Club's state court appeal was rejected, and it agreed to comply with the Division's order. Thus, the only question remaining before the district court was Carey's request for attorney's fees for the time spent litigating the case before the state and federal agencies. *Id.* at 59. The district court denied the request, but a divided panel of the Second Circuit reversed. *Id.* at 59-60.

This Court affirmed. The Court's opinion first examined Title VII's attorney's fee provision, 42 U.S.C. § 2000e-5(k), which provides, in relevant part, that "[i]n any action or proceeding" under Title VII, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." 447 U.S. at 60. The Court then held that the "broadly inclusive" term "action or proceeding" leads to the "inescapable" conclusion that "fees are authorized for work done at the state and local levels," as well as in court. *Id.* at 60-61. This reading of the Act, the Court observed, was fortified by the remedial purposes of Title VII's attorney's fee provision, which was "to facilitate the bringing of discrimination complaints." *Id.* at 63. The Court reasoned that "[p]ermitting an attorney's fee award to one in respondent's position furthers this goal, while a contrary rule would force the complainant to bear the costs of mandatory state and local proceedings and thereby inhibit the enforcement of a meritorious discrimination claim." *Id.*

The Court added that its construction of the Act was consistent with Title VII's "scheme of interrelated and complementary state and federal enforcement" that envisioned "proceedings before the EEOC and in federal court as supplements to available" state remedies for employment discrimination. *Id.* at 65. And, in language especially apt here,

the Court observed that "the availability of a federal fee award for work done in state proceedings following EEOC referral and deferral should not depend upon whether the complainant ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees." *Id.* at 65-66. As the Court emphasized, it "would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies" be vindicated short of federal court litigation. *Id.* at 66. Based on these factors, the Court held that Title VII's "authorization of a civil suit in federal court encompasses a suit solely to obtain a award of attorney's fees for legal work done in state and local proceedings." *Id.*; *see also White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 n.13 (1982) (reaffirming *Carey*'s holding).

To be sure, six years later the Court in *Crest Street* held that an independent suit under 42 U.S.C. § 1988 to recover attorney's fees under Title VI of the Civil Rights Act of 1964 was not authorized. 479 U.S. 6 (1986). Title VI prohibits discrimination by programs receiving federal assistance. In contrast to Title VII, Title VI contains no mandatory deferral provision and the administrative enforcement of the Act is carried out by federal agencies in informal proceedings in which private parties have no statutory role. The *Crest Street* plaintiffs had filed an administrative complaint with the United States Department of Transportation ("DOT") to block the construction of a highway through a predominantly black neighborhood in Durham, North Carolina. *Id.* at 10-11. Based on their complaint, DOT initiated an informal proceeding with federal grantees to resolve the dispute, which was eventually settled in plaintiffs' favor. *Id.* Ultimately, they filed an action under 42 U.S.C. § 1988 for fees incurred during the

administrative proceedings. *Id.* at 11. In holding that section 1988 does not authorize suits exclusively for attorney's fees for participation in agency proceedings under Title VI, the Court found it "entirely reasonable to limit the award of attorney's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in court." *Id.* at 14. The Court also placed considerable emphasis on the "plain import of the statutory language" of section 1988, which provides that "*in the action or proceeding to enforce* the civil rights laws listed . . . *the court* may award attorney's fees." *Id.* at 12 (emphasis in original). This language — especially the "to enforce" proviso — stands in stark contrast to Title VII's attorney fee provision at issue in *Carey*, and relied on here, which provides for an attorney's fee "[i]n any action or proceeding under this subchapter." 42 U.S.C. § 2000e-5(k).[3]

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[3]The government's amicus brief in *Crest Street* highlights the structural differences between Title VI and Title VII which, in the government's view, justified the different results in *Crest Street* and *Carey*. Brief for the United States As Amicus Curiae Supporting Petitioners, No. 85-767, O.T. 1985. According to the government, the question in *Crest Street* turned on the "nature of the administrative proceeding, particularly whether the proceeding is an 'integral' component of the private enforcement scheme." *Id.* at 20 (citation omitted). The government argued that the answer to that question was "no" because Title VI establishes an administrative enforcement process that contemplates no formal role for complainants; rather, the "proceedings are meant to focus primarily on assuring the funding recipient's compliance with Title VI rather than providing individualized relief to victims of discrimination." *Id.* at 14. In contrast, the government defended *Carey* because

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Adhering to *Carey* and rejecting the applicability of *Crest Street* to Title VII cases, the lower courts have, until now, uniformly held that Title VII's jurisdictional provision authorizes suits solely for attorney's fees and costs. The most thorough lower court decision is Judge Heaney's opinion for a unanimous panel in *Jones v. American State Bank,* 857 F.2d 494 (8th Cir. 1988). Although *Jones* recognized that the plaintiff in *Carey* initially sought merits relief as well as fees, whereas in *Jones* the plaintiff was seeking only fees, the court found this to be "a distinction without a difference" in answering the jurisdictional question. *Id.* at 497. Rather, the meaningful distinction lay between Title VII and section 1988. *Crest Street,* the Eighth Circuit found, was inapposite both because section 1988 can be distinguished from Title VII "on the basis of plain statutory language and legislative history," and because "[m]andatory deferral distinguishes the present case from actions which arise under other civil rights laws." *Id.* at 498 n.10. As the court saw it, "[t]he analysis of Title VII offered by the majority in *Carey* requires a decision in favor of Jones." *Id.* at 497.[4]

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[3](...continued)
Title VII plaintiffs were "entitled to attorney's fees for the time spent in administrative proceedings . . . because those proceedings were an essential, indeed mandatory, part of the private enforcement of the relevant statutory scheme." *Id.* The government found its conclusion on this point bolstered by the "to enforce" language which appears in section 1988 but *not* in section 2000e-5(k), arguing that an action "filed for the *sole* purpose of recovering attorney's fees under Section 1988" is not one to enforce Title VI. *Id.* at 26 n.12 (emphasis in original).

[4] The Eighth Circuit's analysis is fully consistent with (continued...)

The Tenth Circuit followed suit in *Slade for Estate of Slade v. Postal Service*, 952 F.2d 357 (10th Cir. 1991). In *Slade*, the plaintiff's complaint initially included a claim for back wages, as well as one for attorney's fees, but the plaintiff abandoned his back pay claim, and the court treated the case as presenting the question whether Title VII authorizes an "independent suit solely for attorney's fees." *Id.* at 360. That question, in the court's view, turned on whether *Crest Street* or *Carey* was the controlling precedent. *Crest Street* did not apply, the court reasoned, because of the marked differences between the language of section 1988 and section 2000e-5(k). "In its holding [in *Crest Street*] that an independent action for attorney's fees is not authorized by § 1988, the Court considered the plain language of the statute '*in the action or proceeding to enforce* the civil rights laws listed.'" 952 F.2d at 360-61 (*quoting Crest Street*, 479 U.S. at 12) (emphasis in *Crest Street*). Distinguishing section 1988's language from Title VII's, the Tenth Circuit noted that "[t]he applicable statute here does not require that the federal court proceeding be brought *to enforce* the laws set forth in § 2000e. Therefore, *Crest Street* is not dispositive of the issue of jurisdiction in this case." *Id.* (emphasis in original). What the Tenth Circuit found dispositive, however, was this Court's decision in *Carey*, which

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[4](...continued)
Webb v. Dyer County Bd. of Educ., 471 U.S. 234, 240-41 (1985), which distinguished section 1988 from Title VII by pointing both to the significant semantic differences (mainly the absence of the "to enforce" language in Title VII) and to the fact that Title VII "expressly requires the claimant to pursue available state remedies before commencing proceedings in a federal forum," in contrast to other civil rights statutes like Title VI and 42 U.S.C. § 1983, which do not require exhaustion.

in its view compelled the conclusion that district courts have jurisdiction in Title VII fee-only cases.[5]

The battle over whether *Carey* or *Crest Street* governs in civil rights cases brought solely for fees has been waged not only in Title VII cases, but also in cases arising under the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. §§ 1400 - 1485. IDEA contains an attorney's fee provision modeled on Title VII's; indeed, in all pertinent respects the provisions are identical. *Compare* 20 U.S.C. § 1415(e)(4)(B) ("In any action or proceeding brought under this subsection, the court in its discretion, may award reasonable attorneys' fees as part of the costs to the parent[] . . . who is the

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[5] The commentators have agreed with Petitioner that the only way to reconcile the tension between *Carey* and *Crest Street* is to conclude that, at least insofar as Title VII cases are concerned, district courts have jurisdiction to entertain actions brought solely for fees. The commentators point to several factors in support of their conclusion: the mandatory nature of Title VII's deferral provisions, the absence of the "to enforce" language contained in section 1988, and the policy reasons favoring fee-only litigation recounted in *Carey*. *See, e.g.*, Schreck, *Attorneys' Fees for Administrative Proceedings under the Education of the Handicapped Act: Of Carey, Crest Street and Congressional Intent*, 60 Temp. L.Q. 599 (1987); Silver, *Evening the Odds: The Case for Attorneys' Fee Awards for Administrative Resolution of Title VI and Title VII Disputes*, 67 N.C. L. Rev. 379 (1989); Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 Tex. L. Rev. 291, 322 (1990); Comment, *Attorney's Fees for § 1983 Claims in Fair Hearings: Rethinking Current Jurisprudence*, 55 U. Chi. L. Rev. 1267 (1988).

prevailing party ") *with* 42 U.S.C. § 2000e-5(k) ("In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . as part of the costs"); *see Moore v. District of Columbia*, 907 F.2d 165 (D.C. Cir.) (*en banc*), *cert. denied*, 498 U.S. 998 (1990).

In the aftermath of *Carey* and *Crest Street*, a number of circuits have considered whether district courts have jurisdiction to entertain IDEA cases brought solely for fees incurred in administrative proceedings. The interpretative question under the IDEA is identical to that presented here under Title VII, since the operative language is the same. The leading case remains the D.C. Circuit's unanimous, 1990 *en banc* decision in *Moore*, which considered and flatly rejected the argument that *Crest Street*'s approach should be applied to statutory language like that set forth in the IDEA and Title VII for essentially the same reasons given by the courts in *Jones* and *Slade*. 907 F.2d at 168-70. *Moore* also noted that Congress, in adding the fee provision to the IDEA in 1986, wanted to ensure that parents who prevailed in administrative proceedings under the IDEA could seek fees in court. This legislative history bolstered the court's conclusion that *Carey* and not *Crest Street* establishes the governing law. *Id.* at 172-76. Insofar as Petitioner can determine, every circuit to address the question thus far has concluded that district courts have jurisdiction under the IDEA to entertain fee-only cases.[6]

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[6] The decisions containing the most extensive discussion of this issue include: *Brown v. Griggsville Community Unit Sch. Dist.*, 12 F.3d 681, 683-85 (7th Cir. 1993) (Posner, C.J.) (approving of reasoning in *Moore*); *Duane M. v. Orleans Parish* (continued...)

The Fourth Circuit's opinion breaks ranks and holds that district courts lack jurisdiction in Title VII cases to entertain cases brought solely to obtain attorney's fees. Although the court below was quick to side-step *Carey*, it provided little by way of coherent explanation for its ruling. For example, despite *Carey*'s unqualified holding that federal courts have jurisdiction under Title VII to entertain "a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings," the Fourth Circuit reached the opposite conclusion and held that *Carey* applies *only* when the plaintiff's complaint also seeks merits relief. *Compare Carey*, 447 U.S. at 66, *with Chris*, 221 F.3d at 654.

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[6](...continued)
Sch. Bd., 861 F.2d 115, 117-20 (5th Cir. 1988); *Eggers v. Bullitt County Sch. Bd.*, 854 F.2d 892 (6th Cir. 1988); and *Barlow-Gresham Union High Sch. Dist. No. 2 v. Mitchell*, 940 F.2d 1280, 1284-85 (9th Cir. 1991). Other relevant decisions include: *Zipperer v. Sch. Bd. of Seminole County*, 111 F.3d 847, 851 (11th Cir. 1997); *Mitten v. Muscogee County Sch. Dist.*, 877 F.2d 932, 935 (11th Cir. 1989); *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188, 1192 n.1 (5th Cir. 1990); *Johnson v. Bismarck Pub. Sch. Dist.*, 949 F.2d 1000, 1003 (8th Cir. 1991); *King v. Floyd County Bd. of Educ.*, 2000 U.S. App. LEXIS 24490 (6th Cir. 2000); *see also Counsel v. Dow*, 849 F.2d 731, 740 n.9 (2d Cir. 1988) (*dictum*). The Fourth Circuit has also said in *dicta* that district courts have jurisdiction over fee-only IDEA cases, *see Combs by Combs v. School Bd. of Rockingham County*, 15 F.3d 357, 359 n.10 (4th Cir. 1994), but the panel ruling here makes no mention of *Combs*, let alone tries to reconcile the two decisions.

Equally troubling is the fact that the Fourth Circuit nowhere explains why the *Carey* rule should apply when the plaintiff prevailed in state administrative proceedings, but not before the EEOC. As explained in more detail below, Congress wanted to ensure that federal employees who opt to bring their claims to the EEOC, rather than to federal court, retain a full opportunity for judicial review of the EEOC's final decisions in their cases. When Congress expanded Title VII to cover federal employees in 1972, it added the separate jurisdictional grant set forth in 42 U.S.C. § 2000e-16(c), which empowers any federal employee "aggrieved by the [EEOC's] final disposition" of her complaint to file suit in the district court. Nothing in that provision excludes cases in which the claimant is aggrieved by an inadequate award of fees and costs. Petitioner expressly invoked this provision in her complaint and briefed it at length before both lower courts. Yet the Fourth Circuit leaves its impact unaddressed. Unless the Fourth Circuit intended to treat *Crest Street* as having overruled *Carey*, which it appears to have done without saying so, then its failure to address this key provision of Title VII is inexplicable. The confusion engendered by the Fourth Circuit about *Carey*'s viability and the meaning of section 2000e-16(c) further underscores the need for review.

B. The Ruling Below Wrongly Denigrates The Importance Of Attorney's Fees In Title VII Cases And Encourages Complainants To By-Pass Administrative Remedies.

In concluding that Title VII does not authorize district courts to entertain fee-only cases, the court below misreads Title VII and denigrates the central role that attorney's fees play in the enforcement of the Civil Rights Act. The upshot of the court's ruling is that Title VII complainants are likely to bring their claims into federal court as soon as possible and end-run

the state and federal agencies that Congress intended to play an integral role in resolving discrimination complaints. The Fourth Circuit concluded that the jurisdictional grant set forth in 42 U.S.C. § 2000e-5(f)(3) — which speaks of "actions brought under this subchapter" — refers only to complaints "to remedy an unlawful employment practice, rather than [complaints that] contain only a single claim for attorney's fees and costs." 221 F.3d at 652 (App. A9). In the court's view, Congress' reference to "this subchapter" was intended to draw a bright-line between "the substantive rights guaranteed by Title VII, specifically the right to be free from employment discrimination on the basis of race, color, religion, sex or national origin" on the one hand, and ancillary remedies like fees and costs on the other hand. *Id.* at 653 (App. A10). As the court put it, "a suit solely for attorney's fees and costs is not an 'action[] brought under [Title VII].'" *Id.* at 654 (App. A13-A14).

The Fourth Circuit's suggestion that the attorney's fee provision of Title VII provides less of a substantive guarantee than do other remedial provisions of the Act conflicts not only with *Carey*, 447 U.S. at 63, but also with a number of decisions of this Court emphasizing the pivotal role the fee provision plays in Title VII's enforcement. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Court noted that, although the legislative history of Title VII's fee provision is "sparse," it is clear that the provision was included "to make it easier for a plaintiff of limited means to bring a meritorious suit." *Id.* at 420 (quotation omitted). Title VII casts the plaintiff in the role of a "private attorney general," vindicating a policy — the elimination of discrimination in employment — that Congress considered of the highest priority. *Id.* at 416; *see also Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401-402 (1968) (in cases under the public accommodation provisions of Title II of the Civil Rights Act, a prevailing plaintiff "should ordinarily

recover an attorney's fee"). For that reason, the Court has made clear "that the *Piggie Park* standard of awarding attorney's fees to a successful plaintiff is equally applicable in an action under Title VII of the Civil Rights Act." *Christiansburg Garment*, 434 U.S. at 417; *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).

Based on this Court's rulings underscoring the importance of Title VII's fee provision, *Carey* observed: "One aspect of complete relief [under Title VII] is an award of attorney's fees, which Congress considered necessary to the fulfillment of federal goals. Provision of a federal award of attorney's fees is not different from any other aspect of the ultimate authority of the federal courts to enforce Title VII." 447 U.S. at 68. As an illustration, *Carey* went on to say that if, for example, state law did not authorize back pay but the plaintiff was entitled to it under Title VII, "the plaintiff may proceed in federal court to 'supplement' the state remedy." *Id.* Building on this example, *Carey* concluded that an award of attorney's fees is no different, and that federal courts remain open to fill the void left by an administrative remedy that falls short of providing a comprehensive remedy under Title VII, including adequate fees. *Id.* The Fourth Circuit's opinion is directly contrary to the Court's reasoning in this regard.

Nor is the Fourth Circuit's decision consistent with the structure and design of Title VII itself. The linchpin of the ruling below is the Fourth Circuit's conclusion that a fee-only action is not one brought under "this subchapter," and hence not within the coverage of section 2000e-5(f)(3). But the "subchapter" referred to in section 2000e-5(f)(3) is "Subchapter VI--Equal Employment Opportunities" of "Chapter 21--Civil Rights" of Title 42 of the United States Code, which is commonly referred to as Title VII. Title VII's attorney fee

provision, set forth in section 2000e-5(k), is plainly part of the same "subchapter" as the provisions the court characterizes as "substantive" guarantees. Thus, the line the court draws is of its own invention, without statutory basis.[7]

Finally, the decision below reflects a lack of sensitivity to the vital role that fee-shifting statutes play in the enforcement of the important federal policies embodied in Title VII. As noted above, Congress considered Title VII's attorney's fee provision integral to the Act's enforcement. The court below paid little heed to that consideration, as one hypothetical illustration shows. Suppose that the EEOC, instead of refusing to award Petitioner's counsel her market rate, had denied her fees altogether, for reasons unauthorized by Title VII. Under the panel's approach, the courthouse door would nonetheless be shut to Chris and her counsel — and every other claimant who prevailed before the EEOC or a state agency but was dissatisfied with the fee award — despite the presence of sections 2000e-5(f)(3) and 16(c). That result would be indefensible in terms of the remedial policies underlying Title VII, as this Court made clear in *Carey, Christiansburg Garment,* and *Albemarle Paper,* but it is the inescapable consequence of the ruling below.

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[7]Indeed, it is far from clear that the Fourth Circuit's ruling would stop at attorney's fees. Attorney's fees, after all, are only one remedy of many available under Title VII. The Fourth Circuit's rationale — namely, that Title VII's jurisdictional reach extends only to the Act's substantive guarantees and not to its remedies — might well bar suit for back pay by a complainant who had otherwise prevailed in an administrative proceeding. That result, of course, would stand Title VII on its head, and run counter to this Court's reasoning in *West v. Gibson*, 119 S. Ct. 1906 (1999).

C. The Ruling Below Will Frustrate Congress' Effort To Encourage Federal Employees To Pursue Discrimination Claims Administratively.

The adverse effect that the ruling below will have on the administrative resolution of Title VII claims is brought into sharp focus by examining the ruling's impact on federal employees. This Court has observed that, insofar as federal employees are concerned, Title VII "provides for a careful blend of administrative and judicial enforcement powers." *Brown v. GSA*, 425 U.S. 820, 833 (1976). Congress overhauled Title VII in 1972 to "proscribe[] federal employment discrimination and establish[] an administrative and judicial enforcement system." *Id.* at 829. The procedures now are spelled out in 42 U.S.C. § 2000e-16, and are supplemented by detailed EEOC regulations. *See* 29 C.F.R. Part 1614 (1999). Taken together, these provisions create "a dispute resolution system that requires a complaining party to pursue administrative relief prior to court action, thereby encouraging quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court." *West v. Gibson*, 119 S. Ct. at 1910. But the rules make clear that ordinarily a federal employee may elect to go to court once more than 180 days have elapsed before *either* the agency or the EEOC. *See* 42 U.S.C § 2000e-16(c); 29 C.F.R. § 1614.108 (2000).

According to the most recent statistics compiled by the EEOC, it takes the CIA an average of 722 days, or nearly two years, to resolve an EEO complaint. *EEOC Federal Sector Report*, at 36. Should the employee opt to appeal to the EEOC she should anticipate that it will take that agency an addition 473 days to conduct appellate review. *Id.* at 65. Title VII makes crystal clear, however, that if a federal employee opts to appeal to the EEOC, she retains her right to file suit to challenge

the EEOC's ruling if she is "aggrieved" by the EEOC's final disposition, *or* if she is dissatisfied with the EEOC's progress after more than 180 days have elapsed. 42 U.S.C. § 2000e-16(c); *see also Brown v. GSA*, 425 U.S. at 832. The purpose of this provision, which in effect gives federal employees two bites at the apple if they go first to the EEOC, is plainly to encourage employees to avail themselves of the administrative forum at the EEOC, thereby avoiding federal court litigation if at all possible. *West v. Gibson*, 119 S. Ct. at 1910-11; *Brown v. GSA*, 425 U.S. at 832-33.

The Fourth Circuit's ruling threatens to unravel Congress' finely wrought deferral scheme. If the Fourth Circuit's ruling stands and EEOC fee determinations are unreviewable unless joined with a merits claim, then federal employees will be inclined to go to the federal courts as soon as possible, especially to those courts that adhere to the *Laffey* formula or calculate fees on the basis of market rates, rather than run a risk of significant under-compensation or non-compensation before administrative agencies. Every year, federal employees file more than 25,000 discrimination claims with their agencies; over 8,000 of these claims end up before the EEOC. *EEOC Federal Sector Report*, at 19, 61; *West v. Gibson*, 119 S. Ct. at 1911 (citing fiscal year 1997 statistics). Even if only an additional ten or twenty percent of these complainants bring their claims directly into federal court, the dislocation and burden on the federal courts, especially those in the Washington, D.C. area, could be substantial.

This is hardly an idle concern. Indeed, it was precisely this concern about the exodus of cases from the EEOC that impelled the Court in *West v. Gibson* to rule that compensatory damages are available to a Title VII plaintiff not only in court, but also before the EEOC. Without that power, the Court

reasoned, cases would be "force[d] into court . . . that the EEOC might otherwise have resolved." 119 S. Ct. at 1910. The same factors motivated the Court in *Carey*. As the Court there stressed, the "existence of an incentive to get into federal court, such as the availability of a fee award, would ensure that almost all Title VII complainants would abandon state [here federal administrative] proceedings as soon as possible. This, however, would undermine Congress' intent to encourage full use of state [here federal] remedies." *Id.* The Court's observations in *West* and *Carey* apply with full force in this case. Because the ruling below places in jeopardy Congress' effort to encourage federal employees to forego litigation and rely instead on administrative agencies to resolve discrimination claims, this case merits review by this Court.

* * *

The Fourth Circuit's ruling deals a serious blow to the effective enforcement of Title VII, which, as Congress well understood, depends on the ready availability of a reasonable attorney's fee for a prevailing plaintiff. By misreading Title VII's jurisdictional provision, the ruling below deprives Title VII complainants of an opportunity to litigate their attorney's fees claims before a federal court. For federal employees, the ruling below gives them a Hobson's choice: They either forfeit their right to full administrative review and head straight to court, or they remain before the agencies and risk having attorney's fees awarded at below market rates, or denied entirely, with no recourse. Neither of those results makes sense, nor are they consistent with Congress' objectives in the Civil Rights Act. Because the Fourth Circuit's ruling is contrary to *Carey*, conflicts with decisions of the Eighth and Tenth Circuits, and is irreconcilable with the unbroken line of authority interpreting identical language in IDEA, this case merits review by this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

November 2000

APPENDIX

Index

Kelly Jean CHRIS, Plaintiff-Appellant,

v.

George J. TENET, Director, Central Intelligence Agency, Defendant-Appellee.

Kelly Jean Chris, Plaintiff-Appellant,

v.

George J. Tenet, Director, Central Intelligence Agency, Defendant-Appellee.

Nos. 99-2140, No. 99-2376

United States Court of Appeals,
Fourth Circuit

Argued: May 3, 2000
Decided: July 27, 2000

BULLOCK, District Judge:

The jurisdictional provision of Title VII of the Civil Rights Act of 1964 provides that, "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under [Title VII]." 42 U.S.C. § 2000e-5(f)(3). We are asked to decide in this case whether the phrase "actions brought

under [Title VII]," as used in 42 U.S.C. § 2000e-5(f)(3), includes an action brought for the sole purpose of recovering attorney's fees and costs for work performed by counsel during administrative proceedings under Title VII that resulted in the settlement, prior to the filing of a judicial complaint, of all of Plaintiff's Title VII claims. The district court held that the phrase "actions brought under [Title VII]" referred only to legal proceedings instituted to enforce substantive rights guaranteed by Title VII and therefore the district court lacked subject matter jurisdiction over Plaintiff/Appellant's claims brought solely for attorney's fees and costs. *See Chris v. Tenet*, 57 F. Supp. 2d 330 (E.D.Va. 1999). For the reasons that follow, we affirm the district court's dismissal of the actions for lack of subject matter jurisdiction.

I.

This appeal arises from two separate actions which were consolidated on appeal. Plaintiff/Appellant, Kelly Jean Chris[1] ("Chris"), is an employee of the Central Intelligence Agency (the "CIA" or "Agency"). In 1993, Chris filed a claim for sex discrimination with the CIA's equal employment opportunity office (the "Agency's EEO office"). The Agency's EEO office investigated the allegations and issued a report on March 30, 1994. Thereafter, on May 2, 1994, Chris filed a charge with the Equal Employment Opportunity Commission (EEOC). In July 1994, while her first claim of sex discrimination was still pending, Chris filed a second claim of sex discrimination with the Agency's EEO office alleging that the CIA had initiated a

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[1]"Kelly Jean Chris" is Plaintiff/Appellant's pseudonym, assigned to her for purposes of these proceedings. Her real name cannot be disclosed due to the classified nature of her government work.

criminal investigation into her relationship with a foreign national as a means of retaliating against her for filing her first complaint of sex discrimination. The Agency's EEO office investigated the second claim and issued a final report in March 1995. Following discovery, the parties entered into a confidential settlement agreement in June 1995 resolving both of Chris's complaints. The settlement agreement provided that in the event the parties did not reach an agreement on the amount of fees and costs due Chris, the CIA would pay her reasonable fees and costs in accordance with 29 C.F.R. § 1614.501(e).[2]

The parties did not reach an agreement on attorney's fees and costs, and Chris filed a petition with the CIA claiming a total of $79,484.00 in fees based on 256.4 hours of attorney work at $310.00 per hour. Chris also sought $1,920.84 in costs. The CIA issued its final decision on the fee petition on August 23, 1995, and awarded fees totaling $48,350.00, which represented a fee award of $250.00 per hour for 193.4 hours of attorney work, and costs totaling $1,237.32. Chris appealed the award to the EEOC. The EEOC issued a decision on July 19, 1996, awarding Chris fees of $59,510.00, which was based on an hourly rate of $275.00 and included an award for the time Chris's counsel spent representing her in an agency Office of

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[2]At the time of the settlement, the regulation provided, in relevant part, that:

> If the complainant, the [complainant's] representative, and the agency cannot reach an agreement on the amount of attorney's fees or costs ... the agency shall issue a decision determining the amount of attorney's fees or costs due .... The decision shall include a notice of right to appeal to the EEOC....

29 C.F.R. § 1614.501(e)(2)(ii)(A) (1995).

Inspector General investigation, as well as an award for the time Chris's counsel expended pursuing her appeal to the EEOC on the fee petition matter. The EEOC also increased the award of costs to $1,534.26. Both Chris and the CIA requested that the EEOC reconsider its decision. The EEOC agreed to reconsider its decision, and on January 7, 1998, the EEOC lowered the fee award to $56,593.00, but increased the award of costs to $1,582.26. In its order of reconsideration, the EEOC advised Chris that "the decision [was] final, and there [was] no further right of administrative appeal from the [EEOC's] decision." (J.A. at 35). The EEOC also advised Chris that if the CIA failed to comply with the EEOC's decision, Chris could "petition the Commission for enforcement of the order," or "file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement." *Id.* In the alternative, the EEOC informed Chris that she had "the right to file a civil action on the underlying complaint," subject to statutory deadlines for such an action. *Id.*

Chris did not pursue one of those options, but filed a civil complaint in the United States District Court for the District of Columbia seeking the difference between the attorney's fees and costs awarded by the EEOC and the attorney's fees and costs she requested in her fee petition. Thereafter, the matter was transferred to the Eastern District of Virginia, and the CIA moved, pursuant to Federal Rule of Civil Procedure 12(b)(1), to dismiss Chris's complaint for lack of subject matter jurisdiction. On July 28, 1999, the district court granted the CIA's motion and dismissed Chris's complaint for lack of subject matter jurisdiction. Chris filed a timely notice of appeal.

While Chris's first two complaints of sex discrimination were pending, Chris filed a third complaint of discrimination with the Agency's EEO office in February 1995, alleging discriminatory reprisal. In September 1996, this claim was also

resolved by way of a confidential settlement. This settlement agreement also provided that, in the event the parties did not reach an agreement on the amount of the attorney's fees due Chris, the CIA would pay her reasonable attorney's fees in accordance with 29 C.F.R. § 1614.501(e).[3] Pursuant to the settlement, Chris's counsel submitted a fee petition to the Agency requesting compensation for 6.6 hours of work at an hourly rate of $315.00. The CIA agreed to compensate Chris's counsel for all 6.6 hours of work, but concluded that the appropriate rate was $275.00 per hour. Chris appealed the CIA's decision to the EEOC, seeking the difference between the hourly rate claimed by Chris and the hourly rate awarded by the CIA. The EEOC determined that a reasonable hourly rate was $295.00, and in a decision dated July 15, 1999, the EEOC ordered the Agency to pay an additional $20.00 per hour for each of the 6.6 hours of attorney work claimed by Chris. As in its prior decision, the EEOC advised Chris that if the CIA failed to comply with the EEOC's decision, Chris could "petition the Commission for enforcement of the order," or "file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement." (J.A. at 81). In the alternative, the EEOC informed Chris that she had "the right to file a civil action on the underlying complaint," subject to statutory deadlines for such an action. *Id.*

On August 16, 1999, Chris filed a civil complaint in the Eastern District of Virginia seeking attorney's fees for work performed by her attorney while Chris's third claim of sex discrimination was in the administrative process. The Agency moved to dismiss the complaint, and the district court, on September 15, 1999, in an amended order, dismissed the

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[3]The Agency did not dispute the amount of costs requested by Chris with regard to her third complaint of discrimination.

complaint for the reasons stated in the July 28, 1999, memorandum opinion dismissing Chris's first complaint. Chris filed a timely notice of appeal and the second appeal was consolidated with Chris's first appeal.

II.

This court reviews *de novo* the district court's dismissal of Chris's claims for lack of subject matter jurisdiction. *See Randall v. United States*, 95 F.3d 339, 343 (4th Cir. 1996); *see also United States v. Linney*, 134 F.3d 274, 282 (4th Cir. 1998) (stating that issues of statutory construction are reviewed *de novo*). Chris contends that Title VII's grant of discretionary authority to federal courts to award attorney's fees and costs, see 42 U.S.C. § 2000e-5(k), is a substantive right that may be enforced in a suit, brought pursuant to 42 U.S.C. § 2000e-5(f)(3), solely for attorney's fees and costs following settlement of all substantive claims during the course of the administrative process.[4] Section 2000e-5(f)(3), the statutory provision granting subject matter jurisdiction to federal district courts over actions brought under Title VII, states, in relevant part, "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of *actions brought under this*

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[4]An award of attorney's fees and costs under Title VII is authorized by 42 U.S.C. § 2000e-5(k), which states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k).

subchapter." 42 U.S.C. § 2000e-5(f)(3) (emphasis added). The issue before the court is whether Chris's claims solely for attorney's fees and costs are "actions brought under this subchapter," and thus within the jurisdiction of the federal courts.[5]

Statutory interpretation necessarily begins with an analysis of the language of the statute. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 85 L. Ed. 2d 692, 105 S. Ct. 2297 (1985). When analyzing the meaning of a statute, we must first "determine whether the language at issue has a plain and unambiguous meaning." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997). If the language is plain and "the statutory scheme is coherent and consistent," we need not inquire further. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). "[T]he sole function of the courts is to enforce [the statute] according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917). Our analysis of the plainness or ambiguity of statutory language is guided "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341.

With these principles in mind, we turn to the language of 42 U.S.C. § 20003-5(f)(3). "Action" is commonly understood to mean "a proceeding in a court of justice by which one

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[5]Although Chris is an employee of the federal government, the ability of federal employees to seek attorney's fees and costs is subject to the same statutory provisions as private sector employees. *See* 42 U.S.C. § 2000e-16(d) (incorporating by reference 42 U.S.C. § 2000e-5(f) through (k) to any "civil action[ ]" brought by a federal employee under Title VII).

demands or enforces one's right." *Webster's Ninth New Collegiate Dictionary* at 54 (1983); *see also Black's Law Dictionary* at 26 (deluxe 5th ed. 1979) (defining "action" as "[t]erm in its usual legal sense means a suit brought in a court"); *Dictionary of Modern Legal Usage* at 20 (2d ed. 1995) (defining "action" as "a mode of proceeding in court to enforce a private right, to redress or prevent a private wrong, or to punish a public offense"). "Under" is commonly understood to mean "subject to the authority, control, guidance, or instruction of." *Webster's Ninth New Collegiate Dictionary* at 1285; *see also Black's Law Dictionary* at 1368 (deluxe 5th ed. 1979) (defining "under" as meaning "according to"); *Dictionary of Modern Legal Usage* at 896 (2d ed. 1995) (stating that "under" "is preferable to *pursuant to* when the noun that follows refers to a ... statute"). Finally, "this subchapter" refers to "Subchapter VI--Equal Employment Opportunities" of "Chapter 21--Civil Rights" of Title 42 of the United States Code, which is commonly referred to as Title VII. Thus, as the district court correctly concluded, the phrase "actions brought under this subchapter" refers to legal proceedings in a court of law to enforce the substantive rights guaranteed by Title VII, specifically the right to be free from employment discrimination on the basis of race, color, religion, sex, or national origin. *See generally* 42 U.S.C. § 2000e *et seq*.

This analysis of the meaning of "actions brought under this subchapter" is buttressed by the specific context in which the language appears. The first sentence of 42 U.S.C. § 2000e-5(f)(3) contains the jurisdictional grant to district courts over "actions brought under [Title VII]." 42 U.S.C. § 2000e-5(f)(3). The next sentence provides four alternatives as the proper venue for "such an action." *Id.* Pursuant to 42 U.S.C. § 2000e-5(f)(3), proper venue under Title VII may be where the unlawful employment practice is alleged to have been

committed, where the employment records relevant to the alleged unlawful employment practice are maintained, where the aggrieved party would have worked absent the alleged unlawful employment practice, or, if the respondent is not found in any of the aforementioned places, where the respondent has its principal office. *See id.* This structural design in which proper venue is controlled by facts associated with the alleged unlawful employment practice supports the conclusion that to be an "action[ ] brought under this subchapter" the civil action must involve a claim to remedy an unlawful employment practice, rather than contain only a single claim for attorney's fees and costs.

This conclusion is also supported by the manner in which other provisions of Title VII use the term "action" or its plural form. The terms "action" or "actions" appear throughout Title VII and are consistently used to refer to a court proceeding to prevent or remedy an unlawful employment practice. Also, as the district court noted:

> After the "action[ ] under this subchapter" is brought in federal court, it becomes the duty of the chief judge to designate "immediately" a judge to hear the case, and then that judge must set the case for hearing "at the earliest practicable date and [ ] cause the case to be in every way expedited." § 2000e- 5(f)(4)-(f)(5). While these requirements are both sensible and understandable in connection with claims of employment discrimination or retaliation, they seem incongruous, if not inappropriate, when applied to an action solely for attorney's fees. It is doubtful that Congress intended to order expedition of claims brought solely to recover attorney's fees.

Chris, 57 F. Supp. 2d at 336.

Our consideration of the ordinary meaning of the language

of 42 U.S.C. § 2000e-5(f)(3), as well as the context in which that language is used in 42 U.S.C. § 2000e-5(f)(3) and throughout Title VII, leads us to conclude that the meaning of "actions brought under this subchapter" is plain and unambiguous. The jurisdictional grant in 42 U.S.C. § 2000e-5(f)(3) refers to legal proceedings in a court of law to enforce the substantive rights guaranteed by Title VII, specifically the right to be free from employment discrimination on the basis of race, color, religion, sex, or national origin. Importantly, the result dictated by our interpretation of Section 2000e-5(f)(3) does not preclude a prevailing complainant from claiming fees and costs; rather, it merely limits the complainant to claiming fees and costs solely in the forum where the substantive claims are ultimately resolved.

Interpreting Title VII as not permitting an action solely for attorney's fees and costs is also consistent with the statutory scheme of Title VII. Congress enacted Title VII "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). To fulfill this goal, Congress created a dispute-resolution system that requires a person with a complaint of illegal discrimination, whether the complainant is a federal employee or a private-sector employee, to exhaust administrative remedies before bringing suit in federal court. *See* 42 U.S.C. § 2000e-16(c) (federal employees); 42 U.S.C. § 2000e-5(c), (f) (private sector employees). As the district court noted, Title VII, including the creation of the EEOC, reflects a congressional intent to use administrative conciliation as the primary means of handling claims, thereby encouraging quicker, less formal, and less expensive resolution of disputes. *See Chris*, 57 F. Supp. 2d at 336. To interpret Section 2000e-5(f)(3)

as permitting a suit solely for attorney's fees and costs incurred during the course of the Title VII administrative process would run counter to the congressional aim of quick, less formal, and less expensive resolution of employment disputes.

Chris argues that *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S. Ct. 2024, 64 L. Ed. 2d 723 (1984), dictates that we conclude that Title VII permits a complaint solely for attorney's fees and costs. We disagree. In *Carey*, the Supreme Court held that Section 2000e-5(f) and Section 2000e-5(k) of Title VII "authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII." *Carey*, 447 U.S. at 71. In reaching this conclusion, the majority stated:

> It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that [Title VII's] authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.

Id. at 66. The *Carey* majority went on to note that:

> We note that if fees were authorized only when the complainant found an independent reason for suing in federal court under Title VII, such a ground almost always could be found.... The existence of an incentive to get into federal court, such as the availability of a fee award, would ensure that almost all Title VII complainants would

> abandon state proceedings as soon as possible. This, however, would undermine Congress' intent to encourage full use of state remedies.

Id. at 65 n. 6, 100 S.Ct. 2024.

Chris's reliance on *Carey* is misplaced for at least two reasons. First, the plaintiff in *Carey*, unlike Chris, initially sought relief in federal court on the merits of her claims in addition to her claim for attorney's fees. *See id.* at 58, 100 S.Ct. 2024; *see also id.* at 71 (Stevens, J., concurring) (stating "this federal litigation was commenced in order to obtain relief ... on the merits ... and not simply to recover attorney's fees. Whether Congress intended to authorize a separate federal action solely to recover costs, including attorney's fees ... is not only doubtful but is a question that is plainly not presented ...."). Second, in *North Carolina Dep't of Transp. v. Crest St. Community Council, Inc.*, 479 U.S. 6, 107 S. Ct. 336, 93 L.Ed.2d 188 (1986), the Supreme Court re-examined the policy concerns noted in the Carey decision and dismissed them as "dicta" and "exaggerated." *Crest St.*, 479 U.S. at 13-14.

Although *Crest St.* is not controlling on the issue before us, its reasoning is persuasive. In *Crest St.*, the Crest Street Community Council (the "Community Council") filed an administrative complaint with the United States Department of Transportation alleging that a proposed plan by the North Carolina Department of Transportation to extend a federally funded expressway through a predominantly black neighborhood in Durham, North Carolina, would violate Title VI of the Civil Rights Act of 1964. *See id.* at 9, 107 S.Ct. 336. The dispute was subsequently settled and, thereafter, the Community Council filed a separate complaint in federal court

to recover fees pursuant to 42 U.S.C. § 1988(b).[6] *See id.* at 11, 107 S.Ct. 336.

The Supreme Court held that a suit for attorney's fees is not an action to enforce any of the civil rights laws listed in Section 1988, and therefore a federal court is not authorized to entertain a claim under Section 1988 solely for attorney's fees. *See id.* In concluding that to be eligible for an award of fees under Section 1988 a complainant must, at a minimum, file a judicial complaint, the Court emphasized that "an award of attorney's fees under § 1988 depends not only on the results obtained, but also on what actions were needed to achieve those results." *Id.* at 14. According to the Court, "It is entirely reasonable to limit the award of attorney's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in court." *Id.* This reasoning carries equal force when applied to Chris's argument that Title VII's jurisdictional grant vests federal courts with jurisdiction over civil actions brought solely for attorney's fees and costs following settlement of all substantive claims during Title VII's administrative process. Because a suit solely for attorney's fees and costs is not an "action[ ] brought under [Title VII]," *i.e.*, a suit to enforce the

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[6]42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or Section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ....

42 U.S.C. § 1988(b) (footnote omitted).

substantive protections of Title VII, federal courts lack subject matter jurisdiction over civil actions brought solely for attorney's fees and costs.

In reaching our conclusion, we are aware of the Eighth Circuit's contrary decision on a similar issue in *Jones v. American State Bank*, 857 F.2d 494 (8th Cir. 1988). In *Jones*, the Eighth Circuit stated that "the policy arguments" set forth in the *Carey* decision dictated a conclusion that Title VII authorized a suit solely for attorney's fees. *See Jones*, 857 F.2d at 498. The policy arguments relied upon by the *Jones* panel included the Supreme Court's belief in *Carey* that awarding attorney's fees only when a party found it necessary to file a complaint in court would be anomalous, *see id.*, as well as the Supreme Court's belief that the absence of a separate award for attorney's fees would discourage complainants from seeking relief or pursuing their claims to their rightful conclusions because Title VII defendants would use delay and continued proceedings to pressure a complainant to settle, *see id.* at 499.

The *Jones* decision was written almost two years after the Supreme Court's decision in *Crest St.* expressly repudiated the first policy argument as "dicta" and "exaggerated." *Crest St.*, 479 U.S. at 14. Furthermore, in *Crest St.* the Supreme Court also rejected the second policy argument on the grounds that awarding attorney's fees only when a party, in order to obtain relief, found it necessary to file a complaint "creates a legitimate incentive for potential civil rights defendants to resolve disputes expeditiously, rather than risk the attorney's fees liability connected to civil rights litigation." *See id.* at 15. The Eighth Circuit did not address the implications of the *Crest St.* decision and simply noted that the mandatory administrative deferral system of Title VII distinguished the Jones case from *Crest St.*, which arose under Title VI and did not involve mandatory administrative deferral. *See Jones*, 857 F.2d at 498 n. 10. We

find this rationale unpersuasive. As an initial matter, the Supreme Court's discussion and disavowal of certain policy arguments underlying the *Carey* decision belie any assertion that the *Crest St.* decision is not relevant to attorney's fees issues under Title VII. Moreover, although Title VI, the statutory framework at issue in *Crest St.*, does not impose mandatory participation in administrative proceedings, the absence of mandatory administrative procedures was never discussed by the Supreme Court as the basis of the *Crest St.* decision. Instead, the Supreme Court focused on the fact that a suit solely for attorney's fees under Section 1988 was not an action to enforce any of the civil rights laws listed in Section 1988, just as a suit solely for attorney's fees and costs is not an action under Title VII. *See Crest St.*, 479 U.S. at 15. For these reasons, we respectfully decline to follow the Eighth Circuit's holding in Jones.

III.

The subject matter jurisdiction of federal courts is limited and the federal courts may exercise only that jurisdiction which Congress has prescribed. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). The jurisdictional grant in 42 U.S.C. § 2000e-5(f)(3) refers to legal proceedings in a court of law to enforce the substantive rights guaranteed by Title VII, specifically the right to be free from employment discrimination on the basis of race, color, religion, sex, or national origin. Accordingly, the jurisdictional grant of 42 U.S.C. § 2000e-5(f)(3) does not extend to an independent action solely

for attorney's fees and costs incurred during the course of the Title VII administrative process.[7] The orders of the district court are therefore

AFFIRMED.

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[7]Because we conclude that the district court lacked subject matter jurisdiction under 42 U.S.C. § 2000e-5(f)(3), we need not address the CIA's alternative argument that Chris, upon agreeing that any fee dispute would be resolved according to 29 C.F.R. § 1614.501(e), waived any right to seek attorney's fees and costs in federal court.

Kelly Jean CHRIS, Plaintiff,

v.

George J. TENET, Director Central Intelligence Agency, Defendant.

No. Civ.A. 99-494-A

United States District Court,
E.D. Virginia,
Alexandria Division.

July 28, 1999

ELLIS, District Judge.

This action for attorney's fees presents a threshold jurisdictional question -- unresolved in this circuit -- whether a Title VII[1] claimant who settles her discrimination claims during the administrative process, but who disputes the amount of the EEOC fee award, may bring a federal action under Title VII solely for attorney's fees.[2] For the reasons that follow, federal

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[1]Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e to 2000e-17 (1994).

[2]This case presents the precise issue that Justice Stevens, in a concurring opinion, noted remained unresolved after the Supreme Court's decision in *New York Gas Light Club, Inc. v. Carey*. 447 U.S. 54, 64 L.Ed. 2d 723, 100 S.Ct. 2024 (1980). In *Carey* the Court held that a Title VII complainant may maintain a cause of action in federal court for attorney's fees incurred in state or local administrative proceedings. *Id.* In his

(continued...)

courts have no jurisdiction under Title VII to hear such an action.

I.[3]

Plaintiff Kelly Jean Chris[4] ("Chris") brought this action against her employer, the Central Intelligence Agency (the "Agency") pursuant to §§ 706(k), 717(c) and 717(d) of Title

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[2](...continued)
concurring opinion, Justice Stevens noted that a properly filed underlying Title VII claim existed there, making it unnecessary to decide whether a fee claim could be brought if federal litigation "had never commenced" and the "aggrieved party had obtained complete relief [on the merits of his claim] in the administrative proceedings." *Id.* at 72, 100 S.Ct. 2024 (Stevens, J., concurring).

[3]The facts recounted here are derived from the Complaint and attachments thereto, including the EEOC's Granting of Requests to Reconsider dated January 7, 1998. The instant jurisdictional challenge proceeds, pursuant to Rule 12(b)(1), Fed. R. Civ. P., by challenging whether these facts, which are assumed to be true, suffice to support subject matter jurisdiction. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (stating that where the operative facts are undisputed, a court proceeds in a manner similar to an evaluation of a Rule 12(b)(6) motion for failure to state a claim, and assumes the truth of all facts as stated in the complaint).

[4]"Kelly Jean Chris" is plaintiff's pseudonym, assigned to her for purposes of this proceeding. Her real name cannot be disclosed owing to the classified nature of her government work.

VII,[5] for the sole purpose of recovering attorney's fees and costs she incurred in pursuing her gender employment discrimination claim against the Agency in proceedings before the EEOC. The pertinent facts begin on September 8, 1993, when Chris, represented by counsel, filed a claim for sex discrimination with the Agency's Equal Employment Opportunity Office (the "Agency's Office"). Specifically, she alleged discrimination occurred when she was denied an overseas assignment because she was "too attractive" and when she was issued a written warning regarding her relationship with a foreign national. Such a warning, she claimed, would not have been issued to a similarly situated male employee. Reasonable attorney's fees and costs were part of the relief she requested.

The Agency's Office investigated her allegations and issued a report on March 30, 1994. Chris alleges that following the issuance of this report, the Agency began retaliating against her by commencing a criminal investigation of her relationship with the foreign national. Accordingly, in July 1994, she filed a second complaint with the Agency's Office, alleging both sex discrimination and retaliation. As a result, the Agency's Office conducted a second investigation and issued a final report in March 1995.

On May 2, 1994, after the Agency issued its first report, but prior to the submission of her second Agency complaint, Chris filed a charge with the EEOC alleging a violation of Title VII's prohibition against sex discrimination. Following discovery, the parties entered into a confidential settlement agreement, in June 1995, which, *inter alia*, provided that in the event the parties did not reach agreement on the amount of the fees and costs due Chris, the Agency would pay her reasonable

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[5]42 U.S.C. §§ 2000e-5(k) and 2000e-16(c), (d) (1994).

fees and costs in accordance with 29 C.F.R. § 1614.501(e). This regulation provides simply that where the parties cannot agree on fees and costs, the Agency will determine these amounts, which the claimant, if dissatisfied, may appeal to the EEOC.[6]

In the event, the parties did not reach agreement on fees and costs. Thus, as the "prevailing party" in her action, on July 15, 1995, Chris filed a petition with the Agency claiming a total of $79,484 in fees based on 256.4 hours of attorney work at $310 per hour,[7] and $1,920.84 in costs.[8] The Agency balked at Chris' claimed hourly rate and offered $ 225 per hour instead. When Chris rejected this offer, the Agency issued its final fee award based on a $250 hourly rate. Eventually, the Agency paid

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[6]29 C.F.R. § 1614.501(e) provides, in pertinent part, as follows:

> If the complainant, the [complainant's] representative and the agency cannot reach an agreement on the amount of attorney's fees or costs ... the agency shall issue a decision determining the amount of attorney's fees or costs due .... The decision shall include a notice of right to appeal to the EEOC ....

29 C.F.R. § 1614.501(e)(2)(ii)(A) (emphasis added).

[7]In determining the fee rate in her petition, Chris used the "Laffey matrix" established by *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354, 371-75 (D.D.C. 1983) and subsequent cases. This is a compensation scheme for awarding attorney's fees based on years of legal experience. The validity of this method is not material to the jurisdictional issue at bar.

[8]These figures are from the amended fee petition. The original petition claimed 254.4 hours of attorney work and $1,809.51 in costs.

Chris attorney's fees in the amount of $48,350, representing a fee award for 193.4 hours of attorney work at $250 per hour, and costs of $1,237.32. Dissatisfied with the Agency's final award, Chris nonetheless retained the $48,350, but sought additional fees by pursuing her administrative remedies in an appeal to the EEOC. She fared better at the EEOC, which issued a decision on July 19, 1996 awarding her attorney's fees in the amount of $59,510, based on a $275 hourly rate, and costs of $1,534.26. In justifying an hourly rate lower than Chris' requested rate, the EEOC determined that her counsel's experience in employment discrimination law was insufficient to warrant the requested $310 per hour. Both Chris and the Agency filed requests for reconsideration with the EEOC, which by decision issued on January 7, 1998, lowered its previous fee award to a total of $56,593 because some of the claimed hours were not compensable, but increased its costs award to $1,582.26. The order on reconsideration, however, did not depart from the EEOC's original determination that the rate of $275 per hour was reasonable for Chris' attorney.

In its order on reconsideration, the EEOC advised Chris that the "decision [was] final, and there [was] no further right of administrative appeal from the [EEOC's] decision," and that she "[had] the right to file a civil action in an appropriate United States District Court." *See* Granting of Requests to Reconsider in *Chris v. Central Intelligence Agency*, EEOC Request No. 05960785 (Jan. 7, 1998). The order further advised Chris that if the Agency failed to comply with the EEOC's decision she could (1) petition the EEOC for enforcement of the order; (2) "file a civil action to enforce compliance with the [EEOC's] order prior to or following an administrative petition for enforcement"; or, (3) "file a civil action on the underlying

complaint" subject to statutory deadlines for such an action.[9] *Id.* (emphasis added).[10] Chris did not elect any of these options, but instead filed an action in the United States District Court for the District of Columbia solely to collect the disputed attorney's fees and costs, namely the difference between the $275 hourly rate awarded by the EEOC and the $310 hourly rate she claimed. This District of Columbia action was subsequently transferred to the Eastern District of Virginia. See 28 U.S.C. § 1404(a). Thus, here Chris seeks "full" compensation for work performed prior to the appeal of the Agency's final decision on her fee petition, allegedly $32,262, reasonable attorney's fees, costs and interest for the time spent appealing the Agency's final decision to the EEOC, and fees and costs incurred in the instant action. The Agency, citing lack of subject matter jurisdiction, has moved to dismiss the Complaint pursuant to Fed. R. Civ. P.

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[9]The order cites 29 C.F.R. § 1614.503(g) which states that if an agency fails to comply with an EEOC order, the complainant has a right "to file a civil action for enforcement of the decision ... and to seek judicial review of the agency's refusal to implement the ordered relief ... or to commence de novo proceedings pursuant to the appropriate statutes."

[10]The Agency complied with the EEOC's order to pay the fees and costs as set out in the decision on reconsideration; however, this payment was returned. In this regard, Chris' federal court action is not to enforce the EEOC's order, a right guaranteed her under 29 C.F.R. § 1614.503(g) but rather it is to commence *de novo* proceedings solely on the amount of the fees.

12(b)(1).[11]

II.

Chris claims reimbursement for fees and costs by virtue of § 2000e-(k) of Title VII, which states that "[i]n any *action or proceeding under this subchapter* the court, in its discretion, may allow *the prevailing party* ... a reasonable attorney's fee (including expert fees) as part of the costs ...." 42 U.S.C. § 2000e-5(k) (emphasis added).[12] More specifically, she claims she was the "prevailing party" in the EEOC proceeding, which, she further claims, was an "action or proceeding" under Title VII. At the threshold, it is important to note that there is no dispute that Chris is a "prevailing party" under § 2000e-5(k). Nor is there any dispute that this is so notwithstanding that her discrimination claim never reached the courts, but was settled instead in the course of the administrative process.[13] Rather, the

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[11]The Agency has also moved to dismiss the Complaint for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6), which motion need not be addressed given the result reached on the jurisdictional question.

[12]The specific authority for Chris to bring a Title VII claim is governed by § 2000e-16 because she is an employee of the federal government; however the authority for federal employees to seek attorney's fees is subject to the same statutory constraints as those of private sector employees, as the provisions of § 2000e-5(f) through (k) govern "civil actions" brought by an employee of the federal government. *See* § 2000e-16(d).

[13]*See Farrar v. Hobby*, 506 U.S. 103, 111, 113 S.Ct. 566, 121 L.Ed. 2d 494 (1992) (recognizing that settlement on the

(continued...)

sole question presented here is whether Congress' jurisdictional grant to federal courts under Title VII encompasses an action solely for attorney's fees following a settlement of the claim in the administrative proceeding. This is a question of statutory construction given that under Title VII, the general provision conferring jurisdiction on federal courts states that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of *actions brought under this subchapter*." 42 U.S.C. § 2000e-5(f)(3) (emphasis added).[14] Thus, the crux of the issue is whether this action solely for attorney's fees constitutes an "action[] under this subchapter" thereby conferring jurisdiction on federal courts.

Because this question is one of statutory construction, analysis must begin with the plain language of the statute. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed. 2d 290 (1989); *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 69 L.Ed. 2d 246 (1981). And, where a statute's plain language is unambiguous the judicial interpretive task is at an end; further judicial efforts to construe or interpret the statute are unnecessary and

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[13](...continued)
merits renders a plaintiff a "prevailing party"); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983) (same); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1359 (4th Cir. 1995) (same); *EEOC v. Service News Co.*, 898 F.2d 958, 965 (4th Cir. 1990) (same).

[14]The reference to "this subchapter" encompasses all of Subchapter VI -- Equal Employment Opportunities -- under Title 42 of the United States Code and is typically referred to as "Title VII." 42 U.S.C. § 2000e to 2000e-17.

inappropriate, as the statute must then be applied in accordance with its plain meaning. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990); *Rubin v. United States*, 449 U.S. 424, 101 S. Ct. 698, 66 L.Ed.2d 633 (1981); *Patten v. United States*, 116 F.3d 1029, 1035 (4th Cir. 1997). When ambiguity infects a statute,[15] it is appropriate to resolve the issue through various settled rules of statutory construction and interpretation. *See United States v. Jackson*, 759 F.2d 342, 344 (4th Cir. 1985), cert. denied, 474 U.S. 924, 106 S.Ct. 259, 88 L.Ed. 2d 265 (1985).

Given these principles, analysis properly begins with a consideration of whether the key statutory phrase "actions brought under this subchapter" has a plain and unambiguous meaning. A persuasive case can be made that it has. When analyzing statutory language, "words are given their common usage." *Murphy*, 35 F.3d at 145. In this regard, "actions" indisputably refers to legal proceedings instituted to vindicate a claim or claims,[16] and the phrase "under this subchapter" defines the nature of the claims to be vindicated. So, the plain and unambiguous meaning of the entire phrase "actions under this subchapter" is legal proceedings to enforce the substantive

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[15]A statute may reasonably be said to be infected with ambiguity when its terms give rise to more than one meaning or interpretation. *See United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994).

[16]The term "action" in its usual legal sense is "[a]n ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." BLACK'S LAW DICTIONARY 28 (6th ed. 1990).

rights guaranteed by the subchapter, which in this instance are the rights to be free from employment discrimination and retaliation based on race, color, religion, sex, or national origin.[17] *See generally* 42 U.S.C. § 2000e to 2000e-17. Given this, the statutory grant of jurisdiction to federal courts extends only to actions to vindicate these substantive rights, and only ancillary to such actions may federal courts discretionarily award fees and costs to the prevailing party. *See* § 2000e-5(k); *cf. White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451-52, 71 L. Ed. 2d 325, 102 S. Ct. 1162 (1982) (finding that a request for attorney's fees under 42 U.S.C. § 1988 "raises legal issues collateral to the main cause of action"). Thus, the jurisdictional grant in § 2000e-5(f)(3) does not extend to an independent action solely for attorney's fees and costs incurred in pursuing a claim for employment discrimination in an administrative forum.

Although the statute's plain meaning points persuasively to this conclusion, the analysis cannot end here, as Chris argues for an alternative reading of the jurisdictional grant. In essence, she argues that the ancillary power of a court to award fees and costs found in § 2000e-5(k) is an independent remedy for which an "action" may be brought under § 2000e-5(f)(3). This reading of the statute is unpersuasive; it runs counter to the plain meaning of the statutory language, and moreover, does not serve well the statutory purpose of reducing unnecessary

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[17]This analysis is consistent with the Fourth Circuit's analysis of the jurisdictional requirement of § 2000e-5(f)(3). *See EEOC v. Henry Beck Co.*, 729 F.2d 301, 303 (4th Cir. 1984) (finding jurisdiction for an action by the EEOC to enforce a pre-determination settlement agreement because it was one "brought directly under Title VII").

litigation.[18]

Perhaps the most telling clue to the meaning of a putatively ambiguous statutory term is the meaning accorded that term elsewhere in the statute. This follows from the "well-established canon of statutory construction that words have the same meaning throughout a given statute." *Baggett v. First National Bank of Gainsville*, 117 F.3d 1342, 1350 (11th Cir. 1997). This principle, applied here, supports the statute's plain meaning as granting jurisdiction only to actions to enforce the substantive rights guaranteed under Title VII and to adjudicate fee disputes only ancillary to such actions. Thus, each time the term "action" (or "actions") appears in Title VII it refers to, or is entirely consistent with, a court proceeding to prevent or remedy an unlawful employment practice.[19] In other words, the statute

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[18]See infra text accompanying notes 22-27.

[19]The words "action" and "actions" are used over forty times throughout the statute. The most frequent use of the terms is found within § 2000e-5, which contains not only the general jurisdictional grant, but also the attorney's fee provision. Two illustrative references, supportive of the result reached here, are § 2000e-5(h) which is titled "Provisions of Chapter 6 of Title 29 not applicable to *civil actions for prevention of unlawful practices*" and states in the subsection text only that Chapter 6 shall not apply to "*civil actions brought under this section*"; and, § 2000e-5(f)(3) which authorizes venue for the "actions under this subchapter" (1) where the unlawful employment practice is alleged to have been committed; (2) where the relevant employment records have been maintained; (3) where the aggrieved party would have worked absent the alleged unlawful employment practices; and if the respondent is not

(continued...)

consistently uses the terms "action" or "actions" to refer to suits to enforce substantive rights. Not once is "action" used in the statute to refer to a suit solely for collateral or ancillary relief.[20] Indeed, to adopt the construction of § 2000e-5(f)(3) Chris advocates would lead to anomalous results unlikely to have been intended by Congress. For example, after the "action[] under this subchapter" is brought in federal court, it becomes the duty of the chief judge to designate "immediately" a judge to hear the case, and then that judge must set the case for hearing "at the earliest practicable date and [] cause the case to be in every way expedited." § 2000e-5(f)(4)- (f)(5). While these requirements are both sensible and understandable in connection with claims of employment discrimination or retaliation, they seem incongruous, if not inappropriate, when applied to an action

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[19](...continued)
found in any of these places then (4) where respondent has its principal office (emphasis added).

[20]In the two specific instances where the statute permits a federal court action for remedial measures to enforce the substantive rights of Title VII, Congress separately granted jurisdiction over such actions. This is persuasive evidence that Congress did not intend to include actions of this nature in the general jurisdictional grant found in § 2000e-5(f)(3). *See* § 2000e-8(c) (granting an employer permission to bring a "civil action" in a district court for relief from an EEOC order or regulation and granting district courts "jurisdiction" to issue an order requiring compliance); and § 2000e-5(f)(2) (permitting the EEOC to "bring an action" for temporary relief pending the resolution of a charge that has not been resolved by conciliation agreement if the EEOC decides judicial "action" is necessary "to carry out the purposes of the Act").

solely for attorney's fees. It is doubtful that Congress intended to order expedition of claims brought solely to recover attorney's fees.[21] In sum, the putative ambiguity resulting from Chris' proposed construction of the phrase "actions under this subchapter" is properly resolved in favor of a construction that excludes an independent federal court action solely for attorney's fees. Importantly, this conclusion is entirely consistent with both Title VII's overall purpose,[22] and, more specifically, with § 2000e-5(k)'s two-fold purpose:[23] (1) to

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[21]Indeed, in practice fees and costs are often not awarded in Title VII cases until after disposition of the appeal unless specific interim relief is warranted. *See White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 454, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982) (acknowledging that district courts have the freedom to establish timeliness standards for hearing and deciding attorney's fee claims).

[22]Title VII's overall purpose is "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).

[23]This purpose may, with caution, be gleaned from § 2000e-5(k)'s "sparse" legislative history. *See Carey*, 447 U.S. at 63. Caution is required because legislators' statements concerning statutory purpose are not invariably accurate; such statements may reflect only a minority legislative view or an effort to influence anticipated litigation over an ambiguity deliberately left in the statute. *See United States v. Charleston County School District*, 960 F.2d 1227, 1233 (4th Cir. 1992).

(continued...)

"make it easier for a plaintiff of limited means to bring a meritorious suit,"[24] and (2) to deter burdensome and frivolous lawsuits by allowing a "prevailing party" -- plaintiff or defendant -- to obtain attorney's fees.[25] Further, the statutory scheme, including the creation of the EEOC, together with the requirement of deferrals to qualified state agencies reflect Congress' intent to use administrative conciliation as the primary means of handling claims.[26] What is central to the statute's scheme and purposes is a prevailing party's right to claim fees and costs in some forum. The result reached here does precisely this; it preserves a prevailing party's right to claim fees and costs solely in the administrative forum where the substantive claim is settled in that forum. In other words, the result reached here gives a prevailing party one, but not two, bites at the fees and costs apple.[27] In so doing, it succeeds in

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[23](...continued)
In short, the statute itself is the best evidence of purpose.

[24]*Id.* (quoting 110 Cong. Rec. 12724 (1964) (remarks of Senator Hubert Humphrey)).

[25]*See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (quoting *Grubbs v. Butz*, 548 F.2d 973, 975 (D.C. Cir. 1976)).

[26]*Alexander*, 415 U.S. at 44.

[27]This is true for both public sector and private sector Title VII claimants. Public sector claimants, like Chris, are statutorily required to exhaust remedies at the EEOC, which in this context, is empowered to grant the full range of Title VII remedies, including an award of fees and costs. *See* § (continued...)

making it "easier for a plaintiff of limited means to bring a meritorious" discrimination claim; it also serves to deter the assertion of frivolous cases; and importantly, it ensures that the fees and costs tail does not ultimately wag the Title VII dog. *See Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (noting that even an attorney's fee request properly sought ancillary to a discrimination claim in federal court "should not result in a second major litigation").

Chris, relying on dicta in the Supreme Court's opinion in

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[27](...continued)
2000e-16(b); see also 29 C.F.R. § 1614.501(e)(1); *West v. Gibson*, 527 U.S. 212, 119 S.Ct. 1906, 144 L.Ed.2d 196 (1999) (holding that the EEOC has the authority under Title VII to award compensatory damages to public sector claimants, thereby making the EEOC a one-stop remedy center). Private sector claimants must also exhaust their remedies at the EEOC and, if appropriate, with a qualified state deferral agency. *See* § 2000e-5(c), (f); *see also Tinsley v. First Union National Bank*, 155 F.3d 435, 442 (4th Cir. 1998) (finding the Virginia Council on Human Rights a qualified deferral agency under Title VII). But in this instance, the EEOC and many (though not all) state deferral agencies have no remedial power and the principal focus is on achieving a settlement through conciliation. In this context, claimants are often *pro se* and the issue of fees does not arise. Where a private sector claimant is represented and chooses to accept a settlement at the administrative level, then the issue of fees may be addressed in the settlement, should the parties choose to do so. Of course if a respondent refuses to address fees in the settlement, a private sector claimant may also choose to reject any settlement and, with a "right to sue" letter in hand, file suit in federal court and seek the full range of Title VII remedies and fees and costs. *See* § 2000e-5(f),(g),(k).

Carey, argues unpersuasively that Title VII's policy and purpose lead to a contrary result. To be sure, a footnote in *Carey* reflects a concern that "anomalous" results would follow from a rule allowing fee claims to be adjudicated in federal court only when ancillary to a filed Title VII claim. 447 U.S. at 65-66 n.6, 100 S.Ct. 2024. Specifically, the footnote expresses the concern that such a rule would "ensure that almost all Title VII complainants would abandon state proceedings as soon as possible," and that this would "undermine Congress' intent to encourage full use of state remedies." *Id.* Chris' reliance on this dictum is unwarranted given that the Supreme Court later reconsidered this policy concern, found it to have been "exaggerated," and ultimately rejected it in favor of more persuasive policy arguments. *See North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 13-14, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986). Specifically, the Supreme Court in *Crest Street* reasoned that "'competent counsel will be motivated by the interests of the client to pursue ... administrative remedies when they are available and counsel believes that they may prove successful.'" 479 U.S. at 14-15 (citing *Webb v. Dyer County Board of Education*, 471 U.S. 234, 241 n.15, 85 L. Ed. 2d 233, 105 S. Ct. 1923 (1985)). And, the Supreme Court also noted that in any event, an interpretation of a statute could not be based on a fear that an attorney would circumvent a potential remedy for his client simply because it did not authorize attorney's fees. *Id.* In addition, the Supreme Court stated that requiring the underlying action to be filed in federal court creates incentives for defendants to settle claims "expeditiously" rather than be subject to attorney's fees for prolonged litigation in federal court. 479 U.S. at 15. Perhaps most instructive was the Supreme Court's finding that, under § 1988, the statute at issue in that case, the award of attorney's fees "depends not only on the results obtained, but also on what actions were needed to

achieve those results," and that "it is entirely reasonable to limit the award of attorney's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in court." *Id.* at 14, 107 S.Ct. 336.[28]

While there is no controlling Supreme Court or circuit precedent resolving the jurisdiction question presented, analogous authority supports the conclusion reached here. The most apt Supreme Court precedent is *Crest Street*, a decision interpreting language in the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, that is virtually identical to the language in § 2000e-5(k).[29] 479 U.S. 6, 107 S.Ct. 336, 93 L.Ed.2d 188. In *Crest Street*, an action brought solely to recover attorney's fees, the plaintiff sought the fees as a result of a motion to intervene in a separate action in federal district court that itself did not involve violations of any civil rights laws. *Id.* at 10, 107 S.Ct. 336. Although the action in which the plaintiff sought to intervene did not include allegations of civil rights

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[28]Further, the Supreme Court stated that it cannot "ignore the plain language of a statute" simply to avoid an "anomalous result" because "'the short answer is that Congress did not write the statute that way.'" *Crest Street*, 479 U.S. at 14 (quoting *Garcia v. United States*, 469 U.S. 70, 79, 83 L. Ed. 2d 472, 105 S. Ct. 479 (1984) in turn quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)).

[29]Section 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of ... [T]itle VI of the Civil Rights Act of 1964 [and other specified civil rights statutes] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ...

42 U.S.C. § 1988(b).

violations, plaintiff's proposed complaint on intervention alleged violations of Title VI of the Civil Rights Act of 1964. *Id.* The district court, without resolving the intervention motion, dismissed the plaintiff's proposed complaint after the original parties reached a settlement. *Id.* Relying on the Title VI claims in its proposed complaint, the plaintiff then filed a separate action in federal district court solely to recover attorney's fees under § 1988(b). *Id.* at 10-11, 107 S.Ct. 336. The Supreme Court held that because the action for attorney's fees was not itself an action to enforce any of the civil rights laws under Title VI, the plain language of § 1988(b) did not authorize a federal court to entertain a claim solely for attorney's fees. *Id.* at 12. For the same reason, the same result should obtain here. Because the instant action is not one to enforce the substantive rights guaranteed under Title VII, then it follows that § 2000e-5(k), like its virtually identical twin, § 1988(b), does not support an independent federal action to adjudicate an attorney's fees claim.[30]

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[30]The difference in language between the two sections consists of the phrase any action "to enforce a provision of [Title VI]" versus the phrase any action "under [Title VII]." The insignificance of this difference is underscored by the frequency and consistency with which courts have recognized that the two provisions are identical. *See, e.g., Hanrahan v. Hampton*, 446 U.S. 754, 758, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980) (noting that § 1988 was patterned after § 2000e-5(k)); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1359 n.10 (4th Cir. 1995) (stating that the "standard for awarding attorney's fees under § 1988 is identical to that under Title VII"); *see also Hensley*, 461 U.S. at 433 n.7 (same) (citing S. Rep. 94-1011, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin.

(continued...)

This application of *Crest Street* to § 2000e-5(k) has been adopted by two unpublished district court decisions.[31] In *Ball v. Abbott Advertising, Inc.*, state agency proceedings resulted in a finding of employer liability for sex discrimination, following which the "prevailing party" filed an action in federal court for attorney's fees. The district court granted summary judgment for

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[30](...continued)
News 5908, 5912). In addition, courts also recognize that the purpose of § 1988 is virtually identical to the purpose of § 2000e-5(k). *See City of Riverside v. Rivera*, 473 U.S. 1315, 1319, 87 L. Ed. 2d 683, 106 S. Ct. 5 (1985).

[31]Other courts discussing, but not squarely deciding the issue, are divided. *Compare Slade v. United States Postal Service*, 952 F.2d 357, 361 (10th Cir. 1991) (stating that the decision in *Crest Street* is not dispositive of § 2000e-5(k) claims because § (k) has no requirement that the federal court action be brought to enforce Title VII), *and Duane M. v. Orleans Parish School Board*, 861 F.2d 115, 120 (5th Cir. 1988) (holding that identical language of the attorney's fee provision of the Education of the Handicapped Act permits an independent action when the complaint has been settled at the administrative level), *with Keesee v. Orr*, 816 F.2d 545, 547 (10th Cir. 1987) (stating that a federal court "has no jurisdiction to hear ancillary claims [for attorney's fees] when there is no Title VII action properly before the court"), *and Paz v. Long Island Railroad Co.*, 954 F. Supp. 62, 64 (E.D.N.Y. 1997) (noting "[c]ommon sense thus dictates that the reference to actions or proceedings 'under this [subchapter]' in § 2000e-5(k) necessarily refers to lawsuits or administrative proceedings alleging discrimination or retaliation in violation of Title VII"), *aff'd* 128 F.3d 121 (2d Cir. 1997).

the employer finding the holding of Crest Street dispositive of § 2000e-5(k) claims.[32] Similarly, in *Alexander v. Stone*, the district court dismissed an action under Title VII solely for attorney's fees brought by a civilian employee of the Department of the Army, and reiterated its reliance on *Crest Street* and the plain language of § 2000e-5(k) in denying reconsideration of the dismissal. *See* No. 91-2685, at 3-4 (D.N.J. May 1, 1992) (unpublished disposition).[33]

Chris relies almost exclusively on *Jones v. American State Bank*, the only circuit court decision addressing and deciding the question presented here. 857 F.2d 494 (8th Cir. 1988). There, the Eighth Circuit relied chiefly on "policy arguments" found in the Supreme Court's decision in *Carey* and "themes which pervade Title VII interpretation" to find federal jurisdiction over an independent fee claim resulting from state administrative resolution of a discrimination claim. *See* 857 F.2d at 498.

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[32]The district court's analysis is recounted in the Sixth Circuit's decision. *See Ball v. Abbott Advertising, Inc.*, 864 F.2d 419, 420 (6th Cir. 1988) (per curiam).

[33]Both of these decisions were appealed, but the respective circuits did not have occasion to address the jurisdiction issue. In *Ball*, the Sixth Circuit affirmed the district court's dismissal of the attorney's fee action, but found it unnecessary to decide the applicability of *Crest Street* to Title VII actions because it found the case was barred by the statute of limitations. 864 F.2d at 420. And, in *Alexander*, apparently while the case was on appeal to the Third Circuit, the parties reached a settlement that included an agreement to vacate the district court's opinion. *See* Michael J. Davidson, *Crest: Judicial Preclusion of an Independent Suit Solely for Attorneys' Fees Under Title VII?*, 18 Del. J. Corp. L. 425, 441-43 (1993).

Notably, the Supreme Court, since *Carey*, has disavowed certain of these policy arguments, particularly the suggestion that prohibiting an independent adjudication of attorney's fees would discourage victims from seeking relief or cause them to settle quickly on the employer's terms. *See Crest Street*, 479 U.S. at 13-15, 107 S.Ct. 336. No mention of this important point is found in *Jones*. Accordingly, the Eighth Circuit's reliance on *Carey* in this regard is unwarranted and unpersuasive. Also unpersuasive is the Eighth Circuit's single sentence, footnote dismissal of the relevance of *Crest Street*. Specifically, the Eighth Circuit simply noted, without discussion, that the mandatory administrative deferral system of Title VII rendered *Crest Street* inapplicable to § 2000e-5(k).[34] *Id.* at 499 n.10. Although claims governed by § 1988 are not subject to Title VII's administrative exhaustion requirements, this distinction is irrelevant to the statutory jurisdictional analysis. *Crest Street* reflects this point; there, the Supreme Court conducted essentially the same sort of statutory analysis performed here and in the course of doing so, found it unnecessary to mention or discuss the absence of such mandatory exhaustion

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[34]Title VII's deferral system requires that an aggrieved party pursue allegations of unlawful employment practices exclusively with a qualified state or local administrative agency for sixty days before that party is permitted to file a charge with the EEOC. *See* § 2000e-5(c). Such a charge filed with a state or local agency is pursued under state or local law and is subject to the remedies and relief permitted therein. *See id.*; 29 C.F.R. § 1601.13(a)(3)(ii). After the sixty days, a Title VII complainant may pursue the charge with the EEOC and, after waiting a minimum of 180 days, may file an action in federal court. *See generally* § 2000e-5.

requirements.[35] Moreover, there is no reason in principle to predicate jurisdiction for an action solely for attorney's fees on Title VII's administrative exhaustion requirement given that after 240 days, a Title VII claimant, like the § 1988 claimant, is no longer barred from bringing the underlying discrimination action in federal court. *See Carey*, 447 U.S. at 66 n.6. (stating that after waiting 240 days, a Title VII complainant "appears to have an absolute right to resort to an action in federal court"). For these reasons, the Eighth Circuit's opinion in *Jones* is unpersuasive here.

In summary, § 2000e-5(k)'s plain language, specific and overall purpose point persuasively to the conclusion that Title VII by its terms does not confer jurisdiction on federal courts to hear an independent claim for attorney's fees following settlement of the substantive claims at the administrative level. This result does not entail unfairness to this or other prevailing parties as such parties would clearly have the one bite of the apple that congress intended.

Accordingly, the Agency's motion to dismiss for lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), is granted.

An appropriate Order will issue.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

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[35]*See* Marjorie A. Silver, *Evening the Odds: The Case for Attorneys' Fee Awards for Administrative Resolution of Title VI and Title VII Disputes*, 67 N.C. L. Rev. 379, 416-19 (1989).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 99-494-A

KELLY JEAN CHRIS,
Plaintiff,

v.

GEORGE J. TENET, DIRECTOR
CENTRAL INTELLIGENCE AGENCY
Defendant.

ORDER

This matter is before the Court on defendant's Motion to Dismiss pursuant to Rule 12(b)(1), Fed. R. Civ. P.

For the reasons set forth in the accompanying memorandum opinion, defendant's Motion to Dismiss is **GRANTED** and the Complaint is **DISMISSED** for lack of jurisdiction.

The clerk is directed to place this matter in the ended cases.

The Clerk is directed to send copies of this Order to counsel of record.

/s/
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
July 28, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 99-1231-A

KELLY JEAN CHRIS,
Plaintiff,

v.

GEORGE J. TENET, DIRECTOR,
CENTRAL INTELLIGENCE AGENCY
Defendant.

AMENDED ORDER[1]

The matter came before the Court on defendant's motion to dismiss pursuant to Rule 12(b)(1), Fed.R.Civ.P.

For the reasons stated in the Memorandum Opinion, *Chris v. Tenet*, _ F.Supp.2d_, 1999 WL 556740 (E.D. Va. Jul. 28, 1999), the motion is hereby **GRANTED**. Because the facts and legal contentions are adequately presented in the materials before the Court, oral arguments in this matter would not aid the decisional process, and hence will not be necessary.

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[1]This order supersedes the order of the Court in this matter dated September 13, 1999 and is necessary because the September 13, 1999 order contained a typographical error indicating that the motion was denied when, in fact, it was granted.

As this order disposes of all of plaintiff's claims, this matter shall be placed among the ended causes.

The Clerk is directed to send a copy of this Order to all counsel of record.

/s/
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
September 15, 1999